IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,

Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner, Qantas Airways Limited (hereinafter Qantas) submits this Reply Brief pursuant to Supreme Court Rule 24(4) in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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This Brief is submitted because Respondent, in its discussion of the rulings of the District Court and the Ninth Circuit and the matters pending before the Civil Aeronautics Board (CAB), erroneously suggests that no collision of the administrative and judicial regimes is possible in this case.

Respondent also mistakenly states that the CAB, under §1002(j)(2) of the Federal Aviation Act, 49 U.S.C.

§1482(j)(2), is without power to suspend the tariff of Qantas (providing for minimum selling prices for its inclusive air tours) filed jointly with other foreign air carriers, without suspending the tariffs of the other carriers.

I. While Respondent points out that the CAB did not take jurisdiction over *all* of the matters alleged in the District Court Complaint in this case (Brief of Respondent, p. 6), Respondent did not directly address the fact that the CAB took jurisdiction under §411 of the Federal Aviation Act of the very *acts enjoined* by the District Court. Nor did Respondent address the fact that, after a full hearing, the District Court found that the acts enjoined were within the initial jurisdiction of the CAB.

While the Ninth Circuit held that the "tour industry" is not *per se* regulated by the CAB (Appendix, p. 24a), the Ninth Circuit did not hold that the acts enjoined were *not* within the jurisdiction of the CAB. The Ninth Circuit held that where the activities of an airline affect persons in an industry not *per se* regulated by the CAB, the Courts can act.

In so holding, the Ninth Circuit has placed unprecedented "intra-industry" limitations on the CAB's pervasive regulatory authority over statutorily defined aspects of the airline industry. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).[1]

The "basic principles" of *Pan American* as enunciated by the Ninth Circuit (see Appendix p. 21a) that the CAB has pervasive regulatory authority only "where the anti-

[1] The portion of the *Pan American* opinion quoted by Respondent in its Brief refers to the Board's statutory authority over the "affiliation of common carriers with air carriers"—"common carriers", however, which are in an industry other than air transportation. Brief of Respondent, p. 10.

competitive effects of the complained of action were *confined* to, and primarily affected the regulated industry", are without support in *Pan American.* Rather, *Pan American* holds that the CAB has pervasive regulatory authority over statutorily defined aspects of the airline industry, notwithstanding possible effects on other industries, which effects must, however, be considered by the CAB "in the public interest."

The decision of the Ninth Circuit is in direct conflict with *Pan American,* and sends this case on a "collision course" which this Court held must be avoided.

Under the Ninth Circuit's decision, followed to its logical conclusion, any ruling of the CAB in this case under §411 of the Federal Aviation Act would have no binding effect on the Courts because it would "affect" a firm in an "unregulated industry". Qantas may be exonerated by the CAB under §411 or be compelled by a cease and desist order to alter its practice of selling its air tours, and yet still be subject to injunctive relief by the Courts, according to the Ninth Circuit.

Since the CAB may find that Qantas did not engage in the *practice* of "shifting" or misappropriating tour business, and may find that under applicable costing factors in the airline industry, Qantas was not selling below cost, injunctive relief by the Court is barred by the applicable decisions of this Court.

The Respondent, as did the Ninth Circuit, speaks in broad categories of the "tour industry" and "airline industry", as if there were no overlapping areas, or as if inclusive tours involving air transportation are part of one, but not the other "industry".

Under *Pan American* and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), the focus is not

upon the airline industry *vis a vis* other industries. The focus is upon the acts or transactions of the airline involved in the case and whether they come within the statutorily defined pervasive regulatory authority of the CAB. The CAB in this case has taken jurisdiction over the acts or transactions at issue in this case—the sale by a regulated carrier of inclusive tours involving air transportation.

In the context of the acts which were enjoined in this case over which the CAB has now taken jurisdiction, Respondent's principal argument that this case is consistent with *Pan American* fails and is without meaning. Respondent stated:

> "[T]he Ninth Circuit's holding that the inclusive tour business is not within the pervasive regulatory authority of the CAB did *not* conflict with the CAB's perception of its jurisdiction." Brief of Respondent, p. 10.

II. Respondent did not address itself to Petitioner's contention that the Ninth Circuit's decision conflicted with *Hughes Tool Co.* In that case, this Court upheld the antitrust immunity conferred by the CAB under §414 of the Federal Aviation Act, even where a firm in another, but related industry, was affected. Rather, Respondent discusses the Board's approval of IATA Resolution 810d, which is not directly involved in the injunctive relief granted in this case. IATA Resolution 810d, approved by the CAB under §412 of the Federal Aviation Act, permitted air carriers to package their own inclusive tours involving air transportation.

The IATA Resolution approved by the CAB under §412 of the Act which *is* directly involved is that resolution providing a minimum selling price formula for inclusive air tours. Brief of Petitioner, p. 5.

This CAB-approved resolution was incorporated into Qantas' tariffs and Qantas sold the tours involved in this case in accordance with that minimum selling price formula. To avoid *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) and the primary jurisdiction of the CAB, Respondent incorrectly states that "Foremost is not questioning the reasonableness of the Qantas tariff. The issue is a *violation* of a tariff." Brief of Respondent, p. 15.

On the contrary, Respondent has not disputed that Qantas met the minimum selling price formula. Rather, Respondent has questioned whether Qantas should be permitted to sell inclusive air tours "below cost" (which Qantas denies), even if it meets the minimum pricing formula approved by the CAB.

If such pricing, provided for in Qantas' tariffs, is "predatory" or unfair, under §1002(j)(2) of the Federal Aviation Act, 49 U.S.C. §1482(j)(2), the CAB clearly has the power to suspend the Qantas tariff. The CAB, in addition, could determine to accept only a Qantas tariff providing for a higher minimum selling price. In effect, the CAB would be requiring Qantas to raise the prices of its tours, just as the District Court ordered in this case. Moreover, should the CAB determine that speedy relief was necessary to prevent harm to Foremost, the CAB has the power and authority to seek injunctive relief in the District Court under §1007 of the Act, 49 U.S.C. §1487.

> "One of the obvious purposes of providing that the CAB may bring suit in district court is to ensure a speedy enforcement of the Act . . ." *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1974).

In this regard, the *Arrow* and *SCRAP* cases become important. Those cases hold that the ICC's tariff suspension power, identical to that of the CAB in this case, was inconsistent with the power of a District Court to grant injunctive relief relating to such matters.

Trying again to avoid the impact of *Arrow* and *SCRAP*, Respondent states at pages 5, 14 and 15 of its Brief that the CAB could not have suspended the Qantas inclusive tour tariff to the South Pacific, because such a suspension would have suspended the operations of all carriers who were parties to the joint tariff, including Air New Zealand, the current sponsoring carrier for Foremost's tours to the South Pacific. This is error. There is no such statutory limitation placed upon the CAB.

A Qantas pricing practice may be suspended under §1002 (j) of the Act without affecting the tariffs filed either jointly or independently by any other air carrier. The suspension power under §1002(j) does not *require* the CAB to suspend the tariff as to all carriers who are parties to the tariff.

III. Finally, the Brief of Respondent does not dispute that the question presented for review by Petitioner is an important question, fundamental to this litigation and ripe for decision by this court, namely:

> "Whether, pending determination by the Civil Aeronautics Board of alleged anticompetitive practices within its jurisdiction under §411 of the Federal Aviation Act, a District Court may under the Clayton Act enjoin a foreign air carrier with respect to those practices." Brief of Petitioner, p. 3.

Respondent acknowledges that action of the District Court and the Ninth Circuit in this case was "unprecedented". Brief of Respondent, p. 22. It is unprecedented not because the situation has never arisen, but because Courts, until the present case, have withheld antitrust injunctive relief regarding matters within the jurisdiction of an agency having pervasive regulatory authority.

CONCLUSION

It is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

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Affidavit of Service

I, MICHAEL J. HOLLAND, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 28th day of April, 1976, served three copies of the foregoing Reply Brief upon Respondent Foremost International Tours, Inc., by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

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/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
28th day of April, 1976

/s/ LAWRENCE MENTZ
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County